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No. 724

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

SOUTHWEST MAGAZINE CO., *Petitioner*,

v.

CITY OF FORT WORTH, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. G. JOHNDROE, JR.
City Attorney
JEROME H. PARKER, JR.
Assistant City Attorney
1000 Throckmorton Street
Fort Worth 2, Texas
Attorneys for City of Fort Worth

S. G. JOHNDROE, JR.
Of Counsel

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Jurisdiction

No substantial federal question compelling review is presented in this case, and therefore no jurisdiction exists to review the decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth and of the Supreme Court of Texas. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288; *State of Arizona v. State of California*, 283 U. S. 423. It is fundamental that the provisions of the Fifth Amendment to the Constitution of the United States are intended solely as a limitation on the exercise of power by the Government of the United States and are not applicable to the legislation of the States. *Barron v. The Mayor and City Council of Baltimore*, 7 Peters 243.

Questions Presented

None of the purported questions presented for review by Petitioner have any bearing on the material facts of record in this case and are not in strict compliance with Rule 23.

Petitioner owned no interest in the railway spur track and had no contractual right to the maintenance of rail service, and the Chicago, Rock Island & Gulf Railway Company, the owner of the spur track, whose franchise had expired in 1932, is not a party to this suit. Thus, on the factual record in this case, the only questions presented for review can be the following:

1. Does the City have the power to require the removal of a railway spur track from its street after expiration of the Railway Company's franchise?

2. Where the franchise of a Railway Company permitting maintenance of a spur track in a public street has expired, is an adjacent landowner entitled to compensation from the City as a result of the removal of the track?

3. Does an adjacent landowner have a vested right and irrevocable special privilege to have a railway spur track permanently maintained in a street superior to the right of the public to use such street and superior to the right and duty of the City to control such public street?

Statement of the Case

As stated by Petitioner, this is a declaratory judgment suit. After being informed that the City of Fort Worth and the State of Texas had determined that it was necessary for the safety of the public that a railway spur track be removed from 7th Street adjacent to Petitioner's property, Petitioner brought this suit seeking to establish a vested right to have such railway spur track remain permanently in 7th Street, a dedicated public street in the City of Fort Worth.

The trial court rendered a summary declaratory judgment in favor of Petitioner.

The Court of Civil Appeals reversed and rendered the summary judgment of the trial court, holding that the franchise to the Railway Company expired in 1932; that the action of the City was a reasonable exercise of the police power; that the interest of the public was paramount; that the State may insist that the streets be kept free of danger; that the City of Fort Worth was not taking away Petitioner's "access" to its property; and that the City has a nondelegable and inescapable duty to maintain its streets in usable condition and to abate any permanent obstruction or encroachment which would interfere with their present, or might interfere with their future, use by the public as the progress of the City may demand.

The Court of Civil Appeals further held that the railway spur track, with standing or moving railway cars, is an obstruction in the public street; that, al-

though "not particularly hazardous" presently, 7th Street is a main artery from the west into downtown Fort Worth, and when the projected improvement by the State of Texas is completed, whereby 7th Street will join with an existing Interstate Freeway System, traffic to the east will increase enormously along 7th Street, and the continued use of the spur track would constitute a serious menace to the traveling public. Further, the court held that the material in a railway track is personal property; that the spur in the instant suit was not on Petitioner's land; that none of Petitioner's land will be taken; and that the spur track did not belong to Petitioner and was not constructed by Petitioner, but was constructed and owned by the Railway Company.

There was no pleading nor proof that the Railway Company had any contractual obligation with the Petitioner to continue to operate and serve Petitioner on the spur track.

As we have previously stated, the Chicago, Rock Island & Gulf Railway Company, the owner of the spur track, is not a party to this suit. Only Petitioner, the adjacent landowner, claims and urges that the expired franchise of the Railway Company created an irrevocable special privilege in favor of Petitioner of having the railway spur track permanently maintained in the public street.

Twelve Texas judges have unanimously rejected all of the contentions urged by Petitioner.

I.

No Substantial Federal Question is Raised by the Petition.

Petitioner's sole claim to a vested right to have the railway spur track maintained in 7th Street is based upon the franchise granted in 1907 to the Chicago, Rock Island & Gulf Railway Company in Ordinance No. 980 of the City of Fort Worth. (Tr. p. 87) This franchise was granted pursuant to a statute of the State of Texas which at the time constituted the special charter of the City of Fort Worth (11 Gammell's Special Laws 1901, page 13; 12 Gammell's Special Laws 1905, page 265).

Section 55d of such special charter specifically prohibited the granting of any such franchise for a longer period than twenty-five years. Section 55d provides in part as follows:

> "***No franchise for a longer period than twenty-five years shall ever be granted or given by the City of Fort Worth."

The 1907 franchise of the Chicago, Rock Island & Gulf Railway Company was never renewed or extended and expired as a matter of law no later than the year 1932. At page 10 of "Brief for Appellee" in the Court of Civil Appeals, Petitioner admitted the expiration of the franchise as follows:

> "It is true that Rock Island lost its exclusive right to use said tracks to the exclusion of all others in or about 1932."

While it is contended that the decision herein conflicts with *Monongahela Navigation Co. v. United States*, 148 U.S. 312, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, and *Delaware, L. & W. R. Co. v. Town of Morristown*, 276 U.S. 182, this is not correct. The fact situations in each and every one of those cases were entirely different from the case at bar. Even a cursory examination of the authorities cited by Petitioner reveals that they have no application to the case at bar and wholly fail to demonstrate any federal question of substance not heretofore decided by this Court.

There has been, in fact, no "taking" of Petitioner's private property in violation of the Constitution of the United States or of Article I, Section 17, of the Constitution of the State of Texas. The railway spur track in question is situated wholly within the paved and traveled portion of 7th Street. The Petitioner is seeking to destroy the power of the City of Fort Worth to control the use of its streets and to remove obstructions therefrom.

This Court has decided the precise question raised here adversely to Petitioner in *Detroit United Ry. v. City of Detroit*, 255 U.S. 171, and the companion case of *Detroit United Railway v. Detroit*, 229 U.S. 39, and held that where a railway company operating in the streets of a city under a municipal franchise has enjoyed the full term of its grant, it no longer has any property right or easement in the street. In those cases the railway company contended that the fact that it accepted the franchise and spent large sums

of money constructing its facilities in the street entitled it to a permanent vested right therein in the nature of an easement which continued after the expiration of the franchise. The railway company further contended that the act of the city in denying the railway company the right to operate its lines without a franchise violated the Constitution of the United States and deprived it of its property without due process of law. This Court met these contentions head-on and rejected them, holding that the municipality may require the railway company to remove its tracks without impairing any contractual obligations protected by the Federal Constitution or depriving the railway company of its property without due process of law.

It is clear from these authorities that the Chicago, Rock Island & Gulf Railway Company possesses no permanent vested right to maintain the railway spur track in 7th Street. Clearly Petitioner, Southwest Magazine Co., can claim only through the Rock Island franchise and can possess no greater right than the Railway Company. Under these circumstances, no substantial federal question exists for review by this Court, and further under the factual record in this case there is no absolute necessity to decide any purported, constitutional questions. *Burton v. United States*, 196 U.S. 283; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324-325, 347-348.

II.

The Court of Civil Appeals at Fort Worth and the Supreme Court of Texas Were Correct in Reversing the Judgment of the Trial Court and Rendering Judgment for the City Because Petitioner Had No Vested Right in Having a Railway Spur Track Permanently Maintained in 7th Street Superior to the Right of the Public to Use and Control Such Street, the Franchise of the Railway Company Had Expired, and the Public Safety Required Such Removal.

Petitioner seeks to support its claim to a vested interest in the railway spur track by contending that the spur track constituted a perpetual easement upon its own land of access to abutting property by rail and by referring to the fifty-five year period that the track has been in use. The holdings of the Court of Civil Appeals and the Supreme Court are to the effect that the fact of such use is wholly immaterial to the issues in this case.

Article 5517 of the *Revised Civil Statutes of Texas* provides that no person shall ever acquire by occupancy or adverse possession any right or title to any portion of any road, street, alley or sidewalk. The Legislature of the State of Texas, in the adoption of Article 1175 of the *Revised Civil Statutes of the State of Texas*, expressly delegated to the City of Fort Worth exclusive dominion and control over its streets and alleys. (Paragraphs 12, 16, 18 and 34, Art. 1175, R. C. S.)

Article I, Section 17, of the *Texas Constitution* spe-

cifically provides in part the following:

> "***and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

By reason of the undisputed fact that the railway spur track is located wholly within the public right of way dedicated for street purposes, the Respondent, City of Fort Worth, has a duty to remove such obstruction. More particularly this is true where an extremely hazardous condition from the standpoint of vehicular traffic is present or is anticipated.

This Court has held that a municipality is not required to await a collision costing the lives of its citizens, as well as great expense to the parties involved, before acting and performing its duties, and further has confirmed the fact that a situation in which railway tracks and rolling stock use and occupy public streets is one that is always dangerous as a matter of law. *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U.S. 394.

The effect of Petitioner's contentions throughout this case has been that the Respondent, City of Fort Worth, is required by law to permit Petitioner to blockade (in perpetuity) a public street for its private benefit upon and across property held in trust by the City for the benefit of the general public.

The fallacious nature of Petitioner's reasoning can be readily demonstrated, for it is beyond cavil that

the Respondent, City of Fort Worth, has plenary power in the control of its streets, alleys and public thoroughfares. Historically this Court and all of the courts of the State of Texas have held in an unbroken line of decisions that any private obstruction in a street is a nuisance per se.

In *Joseph v. City of Austin*, 101 S.W. 2d 381, writ refused, the court held:

> "***The law is settled that as against the public the city could not give the abutting property owners the right to construct permanent obstructions on any portion of a street dedicated to public use by map and plat of an addition. *** In the exercise of these duties *the city is required* to take possession of the dedicated street and to preserve it, and *to cause to be removed or abated any permanent structure which might interfere with its full and free use by the public.* Such is not only the right and power of the city, but it is its nondelegable and inescapable duty to maintain its streets in usable condition, and to abate any permanent obstruction or encroachment which would interfere with their present, or *might interfere* with their future use by the public *as the progress of the city may demand.* City of San Antonio v. Ashton (Tex. Civ. App.) 135 S.W. 757, error refused; Coombs v. City of Houston (Tex. Civ. App.) 35 S.W. (2d) 1066; City of Lockhart v. Commissioners' Court of Caldwell County (Tex. Civ. App.) 278 S.W. 319, error refused.
>
> "The law is also settled in this connection that anything placed in a street or highway of a permanent nature, like a fence, building, or wall, is an obstruction and a nuisance per se, if such ob-

> struction renders the street less commodious for public uses. 21 Tex. Jur. 716, § 201, and cases cited in footnotes 14 to 20. This is the rule in Texas and in all jurisdictions, *notwithstanding space is left for the passage of the public*. The rule and the reasons therefor are well stated in the following cases from other jurisdictions:" (Citing authorities) (Emphasis supplied)

This Court will observe in its examination of the record, and more particularly the deposition of C. M. Thelin, Director of Public Works of the City of Fort Worth, that there will be no unlawful interference whatsoever with Petitioner's access to or from 7th Street. No fence or wall has been, or will be, erected between Petitioner's property and the boundary of 7th Street.

Respondent submits that the authorities cited in the opinion of the Court of Civil Appeals dispose of all Petitioner's contentions that it has been deprived of access.

Actually, the situation involved in the case at bar resolves itself into the single issue of sustaining an application of the police power of Respondent, City of Fort Worth, in controlling the use of its public streets and thoroughfares held in trust for the benefit of the general public. Plainly and simply all we have involved is the removal of a railway spur track in 1962, the franchise for which admittedly expired in 1932. The railway spur track is presently, and will continue to be, an imminently dangerous obstruction. The authorities disclose not only that Respondent has the right

to remove such an obstruction in the exercise of its police power, but also that it has a duty to remove same. Thus, the Respondent, City of Fort Worth, is merely exercising its power and duty to impose traffic regulations with respect to the use and occupancy of 7th Street.

Conclusion

It is abundantly clear from the uncontroverted record in this case that the opinion of the Court of Civil Appeals and its reversal and rendition of the judgment of the trial court is absolutely correct. It has never been the law in this State or in any State that there can be any permanent and perpetual vested right or easement to have a railway spur track located in the public street adjacent to one's property; it has never been the law in this State or in any State that one can obtain a vested right or an irrevocable special privilege to have a railway spur track permanently maintained in the street "superior to the right of the public to use the street" and superior to the authority of the legislative body to control the public streets. More particularly is this true when the uncontroverted record discloses that the franchise of the Railway Company had, in fact and in law, admittedly expired in 1932.

The decision of the Texas Court of Civil Appeals as set forth on pages 26 through 33 in Appendix "B" of the Petition, which was in effect affirmed by the Supreme Court of Texas without a written opinion, Appendix "C", page 34 of the Petition, is in all re-

spects correct, and upon that opinion and for the foregoing reasons the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

S. G. JOHNDROE, JR.
City Attorney

JEROME H. PARKER, JR.
Assistant City Attorney

By S. G. Johndroe Jr.
Attorneys for City of Fort Worth
1000 Throckmorton Street
Fort Worth 2, Texas

Copies of this Brief in Opposition to Petition for Writ of Certiorari have been served as provided by Rule 33 by personal delivery to counsel or a clerk in the office of Crumley & Hooper and Winfred Hooper, Jr., 1405 Fair Building, Fort Worth, Texas, this 17th day of January, 1963.

S. G. Johndroe Jr.
Counsel for Respondent